No. 07-210

IN THE
Supreme Court of the United States

JOHN BRIDGE, *ET AL.*,
Petitioners,
v.
PHOENIX BOND & INDEMNITY CO., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

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March 12, 2008

QUESTION PRESENTED

Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

Respondent Phoenix Bond & Indemnity Company has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent BCS Services, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioners engaged in a pattern of conduct indictable as mail fraud. That conduct caused a direct, immediate, and certain injury to respondents, and respondents readily can establish proximate cause under the common law and this Court's precedents. On its face, therefore, petitioners' conduct constitutes a plain violation of civil RICO.

Petitioners contend that RICO liability is nevertheless foreclosed because petitioners executed their mail fraud scheme by directing the fraudulent statements at a third party. Citing their understanding of the common law, petitioners contend that such "third-party reliance" is never sufficient for a RICO claim when the predicate acts involve mail fraud. Instead, "first-party reliance," *i.e.,* reliance by the plaintiff, is required.

Petitioners' requirement of first-party reliance is woven from whole cloth. Nothing in the text of RICO mandates that the victim of the scheme rather than the party through whom the defendant operates must rely on the defendants' fraud. RICO provides a cause of action not for "fraud," but instead for acts "indictable" as "mail fraud," and the latter statutory term indisputably covers conduct extending beyond what petitioners contend was actionable at common law. Petitioners' crabbed conception of the common law of fraud — even if it were accurate, and it is not — thus provides no justification for grafting an additional element onto the statute Congress enacted.

The requirement of proximate cause similarly does not impose the limitation petitioners seek. To be sure, reliance by some party is generally required to establish causation — if a mail fraud falls in a forest and no one is there to hear, it is likely that no one will be damaged by the fraud. But third-party reliance can surely provide that requisite causal connection.

There also is no basis for petitioners' contention that, at common law, a plaintiff could establish proximate cause only when the plaintiff personally relied on the fraudulent statement at issue. For nearly 200 years it has been settled that the intended victim may sue when a defendant fraudulently induces a third party to take action that harms the plaintiff, but not the third party. Thus, when a defendant induces a seller by fraud to take goods set aside for the plaintiff and to sell those goods to the defendant instead, the defendant is liable to the plaintiff for its fraud at common law. Nothing in the mail fraud statute or in RICO narrows the common law's reach.

Moreover, this Court already has explained in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), how to analyze the directness requirement that proximate cause imposes on RICO mail fraud claims, and petitioners do not (and cannot) dispute that respondents have established proximate cause under that analysis.

Petitioners are thus left to conjure a parade of horribles to justify their novel proximate cause

restriction. Their concerns are unmoored from the statute, the common law, and this Court's precedent. But even if this Court rather than Congress were the appropriate forum for petitioners' concerns, petitioners' floodgates arguments ignore that *Holmes* and *Anza* already restrain the scope of claims that can reasonably satisfy the requirement of proximate cause. Moreover, the first-party reliance restriction petitioners urge is arbitrary. Adopting the restriction might limit RICO claims, but only in a manner divorced from the common law and tailored not at all to the harms that Congress addressed in RICO.

STATEMENT OF THE CASE

This case involves petitioners' scheme to obtain by fraud a vastly disproportionate share of valuable tax liens that are the core of respondents' business.

A. Cook County's Annual Tax Sale.

Petitioners' scheme is set forth in detailed allegations in respondents' complaint, all of which must be taken as true for this appeal. Petitioners' fraud affected the sale of tax liens on property located in Cook County, Illinois. The tax liens arise when a property owner fails to pay required real estate taxes to the County. Pet. App. 1a. Instead of pursuing its rights as the holder of the tax liens, the County annually sells tens of thousands of the liens to private "tax buyers" such as petitioners and respondents. *Id.* at 1a, 10a.

Although denominated an "Annual Tax Sale," the County in fact distributes liens through a system

described by Chief Judge Easterbrook as "allocation by lot," Pet. App. 2a, under which the County ensures a fair apportionment of liens by allocating them to willing and qualified tax buyers on a "rotational basis." JA 17-18 (Compl. ¶ 36). The process works as follows. *See generally* Pet. App. 1a-3a (describing process); JA 16-22 (Compl. ¶¶ 32-51) (same). A tax buyer who acquires a lien must pay the County the taxes due. The owner of the property then has the opportunity to redeem the lien by paying both the outstanding taxes and a statutory penalty assessed upon the property owner, up to a maximum of 18%. Pet. App. 1a-2a.

At the tax sale, tax buyers identify the penalty that will be imposed upon the property owner to redeem the lien. The tax buyer willing to accept the *lowest* penalty is awarded the tax lien. Pet. App. 1a-2a. The new lien holder then may assert its rights under the lien. If the property owner pays the back taxes and statutory penalty (in the amount established at the tax sale), the property owner retains the property. If the property owner does not pay within a specified period (two to three years), the lien holder may obtain a tax deed and become the parcel's new owner. *Id.* at 1a.

Because the parcels at issue almost always have economic value beyond the amount of the unpaid taxes, the vast majority of parcels at the County's tax sale attract multiple tax buyers willing to accept a 0% penalty. *Id.* at 2a; JA 17-18 (Compl. ¶ 36). Tax buyers thus do not expect to make their money by collecting penalties from property owners for taxes

that have accrued at the time of the sale. Instead, tax buyers can profit in two ways: first, they collect a 12% penalty on any additional real estate taxes that accrue *after* the sale and that the property owner must pay to redeem the lien on the property; and second, tax buyers can resell the properties of owners who do not redeem the lien. *Id.* at 18 (Compl. ¶ 38). As Chief Judge Easterbrook noted, from the County's perspective, the fact that tax buyers are willing to purchase liens and accept a 0% penalty on existing unpaid taxes "is all to the good: [the County] recovers the taxes, and owners need not pay extra." Pet. App. 2a.

The principal problem facing the County is how to distribute the tens of thousands of liens to the qualified tax buyers willing to purchase them for the same 0% penalty. *Id.*[1] The County does not allow tax buyers to offer a "negative" penalty; as Chief Judge Easterbrook observed, if a negative penalty were imposed, delinquent property owners would actually be better off by not paying their taxes at the originally assessed full value. *Id.* at 2a. The County, instead, ensures a fair apportionment of liens by awarding parcels among identical 0% tax buyers on a rotational basis, so that tax buyers receive parcels "according to the ratio of their bids to other identical bids." Pet. App. 2a.

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[1] In order to prevent collusion among tax buyers — *i.e.*, to prevent buyers from all offering to accept only a statutory penalty above 0% — the County will not sell a tax lien when the lowest penalty rate bid by multiple buyers is above 0%.

The use of the rotational apportionment system leaves the tax sale process open to manipulation by a tax buyer who sends multiple agents to the annual sale to garner a disproportionate number of "entries" in the rotation. *See* Pet. App. 2a. The County thus places restrictions to ensure that each tax buyer is an independent entity, thereby protecting other bidders and ensuring a fair apportionment of liens, as the County intends.

As part of its registration submission, for example, each tax buyer must attest to its compliance with the so-called "Single, Simultaneous Bidder Rule," which prohibits a tax buyer from having "related entities" submit separate registrations "for the intended or perceived purpose of having more than one person bidding at the tax sale at the same time for the intended or perceived purpose of increasing the principal's likelihood of obtaining a successful bid on a parcel." JA 67 (Compl. Ex. A) (emphasis in original).

In addition, beginning in 2004, each tax buyer was required to "represent and warrant" "under oath or affirmation" that it is truly independent from other tax buyers. Thus, a tax buyer attests (among other things) that it (A) "has no capital, purchase money, or other finances in common" with other buyers; (B) "shares no common ownership interest or common source of funds" with other buyers; and (C) "has no agreements to purchase or sell any parcels" obtained by other tax buyers. JA 21 (Compl. ¶ 50); JA 65-66 (Compl. Ex. A). Making these "representations and warranties" and affirming

compliance with the Single, Simultaneous Bidder Rule are prerequisites to a buyer's participation in the tax sale. Pet. App. 2a; JA 21 (Compl. ¶ 48).

B. Petitioners' Scheme.

Petitioners are tax buyers who created an enterprise to obtain by fraud a vastly disproportionate share of tax liens at Cook County annual tax sales in 2002-2005. Petitioners all completed registrations, swearing on penalty of perjury that they complied with the County's related entity restrictions: petitioners made the required representations and warranties and affirmed compliance with the Single, Simultaneous Bidder Rule. Petitioners' sworn statements, however, were false.

Led by Sabre Group, LLC and its principals Barrett Rochman and John Bridge, petitioners arranged to pack the tax sale room. Bridge and Rochman arranged for the formation of numerous tax buyers (collectively, the "Related Entities"). Many of the Related Entities were headed by relatives of Bridge or Rochman: Bridge's brother was a principal in one, and his nephew was a principal in two others, JA 13, 14, 16 (Compl. ¶¶ 10, 11, 19, 28, 29), and Rochman's sons and other relatives headed still other Related Entities, JA 14-15 (Compl. ¶¶ 16, 22-25). Bridge and Rochman directed the Related Entities to register for the tax sales and to provide the fraudulent statements that concealed from the County and from other buyers their connection to Sabre. The Related Entities received thousands of liens at 0% penalty under the

rotational apportionment system. Pursuant to prior agreement between Sabre and the Related Entities, the various tax buyers within the Sabre enterprise then transferred all of their liens to Sabre shortly after the conclusion of the tax sales. JA 24-32, 34-41 (Compl. ¶¶ 59-63, 68-73, 78-89, 93-94).

The only victims of petitioners' scheme were rival tax buyers who were defrauded out of their fair share of liens. The County suffered no financial harm, because the tax obligations on all liens were paid in full. And the property owners suffered no financial harm, because the penalty on the tax liens was 0%, the minimum allowed by law. Only the other tax buyers lost liens and the related profit from those liens they otherwise would have obtained.

C. Proceedings Below.

Respondents Phoenix Bond & Indemnity Co. and BCS Services, Inc. are two tax buyers who were directly injured by petitioners' scheme. At each of the tax sales in question, respondents obtained hundreds of liens from the County with a 0% penalty under the rotational apportionment system. But respondents were deprived of many hundreds of additional liens they would have received under that system, but did not because of petitioners' fraud.

In July 2005, respondents filed suit in the United States District Court for the Northern District of Illinois seeking to hold petitioners responsible under RICO for their fraud. Respondents alleged predicate violations of the mail fraud statute, asserting that petitioners had caused the mails to be used in furtherance of their scheme when the County mailed

scores of notices to property owners, which are legally required for tax buyers such as petitioners to realize the value of the tax liens they acquire. Pet. App. 3a, 12a (describing relevant mailings); *see also* JA 19-20 (Compl. ¶¶ 40-42) (same).

The District Court granted petitioners' motion to dismiss. Pet. App. 9a. The court recognized that "only the plaintiffs and other competing buyers, as opposed to the Treasurer or the property owners, would suffer a financial loss" from petitioners' scheme. Pet. App. 17a. Nevertheless, the court found it significant that "the misrepresentations were made to the Treasurer and the mailings were sent to the property owners." *Id.* at 18a. Thus, although noting it was a "close question," the District Court concluded that respondents lacked standing, because they "were not recipients of the alleged misrepresentations and, at best were indirect victims of the alleged fraud." *Id.*[2] Respondents timely appealed.

In a unanimous opinion written by Chief Judge Easterbrook and joined by Judges Posner and Evans, the Seventh Circuit reversed. Pet. App. 1a. Chief Judge Easterbrook made quick work of petitioners' standing argument, noting that petitioners' conduct

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[2] Respondents also alleged a state law claim of tortious interference with prospective business advantage. Once it had dismissed the RICO claim, the District Court declined to exercise supplemental jurisdiction over the state law claim and dismissed that claim without prejudice. Pet. App. 18a. Petitioners have challenged the sufficiency of the claim under state law.

caused "an actual (and substantial) reduction in the number of liens [respondents] take away," and that respondents' injury could be redressed by damages. *Id.* at 3a-4a.

The court then addressed the issue of proximate cause. Chief Judge Easterbrook noted that the framework established in this Court's decisions in *Holmes* and *Anza* "poses a set of questions" to inform the proximate cause inquiry: "Is someone else a distinctly better enforcer? Does the presence of intermediate parties make it too hard to calculate damages — or create a risk that recovery by this plaintiff will come at the expense of someone with a better claim?" Pet. App. 4a.

Answering those questions, Chief Judge Easterbrook noted, led inexorably to the conclusion that the requirements of proximate cause were satisfied. Thus, although petitioners maintained that Cook County was the victim of their fraud, "Cook County did not lose even a penny: each winning bidder always pays all back taxes and interest. . . . The *only* injured parties are the losing bidders, who acquire fewer tax liens than they would if the Single, Simultaneous Bidder Rule were followed." Pet. App. 5a (emphasis in original). The court noted that the County doubtless could enforce its own rule, but it had no financial incentive to do so. *Id.* at 6a. Moreover, "[i]f a government's ability to penalize fraud knocked out private litigation, then [RICO's private right of action] would no longer apply when the predicate act is fraud, for

governments always have some ability to detect and penalize frauds." *Id.* at 6a-7a.

Chief Judge Easterbrook also rejected petitioners' argument that respondents could not sue because no false statements were made to them. *Id.* at 7a. Citing Seventh Circuit precedent, as well as case law such as Chief Judge Boudin's opinion for the First Circuit in *Systems Management, Inc. v. Loiselle*, 303 F.3d 100 (1st Cir. 2002), the Court of Appeals held that "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." Pet. App. 7a. (emphasis in original). Thus, "[a] scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's." *Id.* Because respondents' injury was "direct rather than derivative," and "the injury satisfies the requirements of *Holmes* and *Anza*," respondents were entitled to an opportunity to prove their claims at trial. *Id.* at 8a.

Nor did the Court of Appeals find persuasive petitioners' argument that respondents were outside the "zone of interests" protected by the mail fraud statute. *Id.* Because respondents were a direct victim of petitioners' fraudulent scheme (even though not a direct recipient of the false statements), the court found respondents to be within the zone of persons the mail fraud statute was designed to protect. Thus, the court concluded that the zone-of-interests argument here was "just a different take on the proposition that only recipients of the untruth

have a remedy" under RICO based on mail fraud, which the court had rejected. *Id.*

D. Subsequent District Court Proceedings.

Following remand from the Seventh Circuit, respondents filed two amended complaints with the District Court. *See* Corrected Second Amended Complaint and Demand for Jury Trial. (D.E. 214) ("Amended Complaint"). In addition to including substantial evidence of the fraud at issue gathered during discovery, the Amended Complaint alleges that petitioners generally had multiple buyers simultaneously pursuing the same liens. The Amended Complaint also specifically identifies the thousands of liens from each annual tax sale during the period 2002-2005 on which respondents offered a 0% penalty, but which the County awarded to petitioners under the (distorted) rotational apportionment system. *See* Amended Complaint ¶¶ 72, 86, 115, 131 & Exs. B1, B2, B3, B4 (D.E. 214).[3]

Following the grant of certiorari, the defendants sought, and the District Court granted, a stay of proceedings pending this Court's decision.

SUMMARY OF ARGUMENT

Petitioners' lead argument, that reliance is a freestanding element of a civil RICO claim

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[3] Although beside the point for present purposes, petitioners are thus incorrect to contend that respondents have failed to "identify any properties on which the defendants simultaneously bid and on which the plaintiffs also bid and lost." Petr. Br. 11.

predicated on mail fraud, is untenable. Petitioners concede that neither the mail fraud statute nor RICO itself contains an express reliance requirement. Petitioners maintain, nevertheless, that civil RICO claims predicated on mail fraud must allege the elements of a common law civil fraud action, including (in their view) reliance by the plaintiff. Even if petitioners were correct about what the common law requires — and they are not — the argument fails at a more basic level. Nothing in the text or structure of RICO requires a plaintiff to prove the elements of common law fraud. RICO has its own elements, including the commission of a pattern of "indictable" criminal activity. A civil RICO claim cannot be predicated on common law fraud, and nothing in RICO transforms a claim predicated on indictable mail fraud, which does not require proof of reliance, into a claim for common law civil fraud.

Nor are petitioners correct in their second argument, that proximate cause may exist in a RICO mail fraud case only if the *plaintiff* receives the falsehoods at issue and personally relies on those misstatements. To be sure, RICO's proximate cause requirement generally will require proof that someone relied on the falsehoods. The common law has long recognized, however, that frauds may occur in many ways. And in cases dating back to the birth of the Nation, courts have upheld claims for damages based on fraud where the defendant made a false statement to a third party that directly caused injury to the plaintiff. This principle of "third-party reliance" is well-established in the Restatement of Torts, on which petitioners heavily rely. In addition

to claims for misrepresentation that may be brought by the *recipient* of a false statement (on which the recipient must justifiably rely), the Restatement recognizes that claims for "injurious falsehoods" may be brought where the defendant makes false statements to a third party, and that claims for wrongful interference may lie where the defendant "induc[es] a third person by fraudulent misrepresentation not to do business with the other." *Restatement (Second) of Torts* § 767 cmt. c, at 30 (1979). The common law has never limited the actionability of fraud to instances of "first-party reliance."

This Court already has identified in *Holmes* and *Anza* the factors governing the proximate cause analysis in RICO cases, and, although petitioners did not seek review of the Court of Appeals' application of those factors, the Court of Appeals' analysis is plainly correct. First, the entirety of respondents' injury is attributable to petitioners' fraud as "distinct from other, independent factors." *Holmes*, 503 U.S. at 269; *Anza*, 547 U.S. at 458. Second, there is no "appreciable risk of duplicative recoveries" among plaintiffs "removed at different levels of injury from the violative acts." *Holmes*, 503 U.S. at 269. And third, because the County did not lose "even a penny" by reason of petitioners' fraudulent scheme, there is no distinctly better plaintiff in this case that can be "counted on to vindicate the law as private attorneys general." *Holmes*, 503 U.S. at 258; *Anza*, 547 U.S. at 460. Petitioners' scheme was intended to have an effect *only* when neither the County nor property owners could be harmed, and when the only issue

was how valuable tax liens would be allocated among identical tax buyers willing to accept a 0% penalty.

Faced with statutory text and precedent that foreclose their position, petitioners and their *amici* resort to practical considerations and raw policy arguments. But petitioners' practical concerns are hyperbole, and their policy arguments are both misguided and directed to the wrong forum. There is no risk that affirming the decision of the Court of Appeals will create an avalanche of RICO claims: the reality is that RICO claims are and will continue to be a tiny percentage (far less than 1%) of the federal docket. This Court's proximate cause requirements as set forth in *Holmes* and *Anza* will continue to preserve RICO only for plaintiffs directly injured by predicate acts of racketeering activity, such as respondents here. There is thus no reason to be concerned about a potential for misuse of RICO claims predicated on mail fraud. In any event, as this Court previously has emphasized, such concerns are properly addressed to Congress.

As Congress made clear in creating an express private right of action for those injured in their "business or property," RICO was intended to combat the "illegal use of force, fraud and corruption" against "competing organizations." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (Statement of Findings and Purposes). Because respondents were directly injured by petitioners' fraudulent scheme, the decision of the Court of Appeals is correct and should be affirmed.

ARGUMENT

The issues here are starkly presented. As part of a scheme designed and intended to take business from respondents and other tax buyers by fraud, petitioners falsely swore to the County that they complied with the County's related entity restrictions. The County relied on those representations: absent the false statements, petitioners would not have been allowed to participate in the annual tax sales. Because of their participation in the sales and the scheme they employed to pack the room with related entities, petitioners acquired liens that they would not have acquired otherwise, and that would have been assigned to respondents and other tax buyers under the County's rotational apportionment system. To effectuate this scheme, petitioners caused the mails to be used when property owners were sent the required notices. And, finally, only respondents and other tax buyers, and not the County or property owners, suffered financial harm from this fraud.

The question thus presented is whether respondents — the direct and immediate victims of petitioners' mail fraud scheme — are nonetheless barred from pursuing a civil RICO claim merely because a third party, and not respondents, received and relied upon the fraudulent statements. The text of RICO, ample precedent from this Court and from the common law, and policy considerations all make clear that there is no bar to respondents' claims.

I. RELIANCE IS NOT AN ELEMENT OF A RICO CLAIM.

Petitioners' lead argument is that reliance is a freestanding "element" of a civil RICO claim predicated on mail fraud. Petr. Br. 18. According to petitioners, such RICO claims are effectively claims for common law civil fraud, which they contend includes a first-party reliance element. Petr. Br. 16-22. Petitioners are wrong about what the common law requires — third-party reliance of the type alleged here has been sufficient at common law for centuries. *See infra* Part II. But RICO's text, structure, and purpose refute petitioners' claims at a more fundamental level. RICO is not the equivalent of civil common law fraud, but is instead a federal law triggered by the commission of defined predicate acts, including mail fraud, and neither the mail fraud statute nor RICO itself contains a reliance element. To be sure, RICO requires that civil plaintiffs demonstrate proximate causation, which "in the general case" will require some showing of reliance. *Anza*, 547 U.S. at 478 (Thomas, J., concurring in part and dissenting in part). But Congress left "no room in the statutory language for an additional" reliance element — let alone the first-person reliance requirement advocated by petitioners — and thus this Court should not craft such an element of its own accord. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985).

A. Statutory Background.

In rebutting petitioners' claim that first-party reliance is an element of RICO, it is helpful to begin

with RICO's statutory structure. Congress drafted RICO as "an aggressive initiative to supplement old remedies and develop new remedies for fighting crime." *Sedima*, 473 U.S. at 498. Faced with a "new situation in which persons engaged in long-term criminal activity often operate[d] wholly within legitimate enterprises," *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989), and believing that "existing law . . . was not adequate" to address the problem, *United States v. Turkette*, 452 U.S. 576, 586 (1981), Congress used "self-consciously expansive language" to "attack[] crime on all fronts." *Sedima*, 473 U.S. at 498.

To this end, RICO makes it unlawful for a person (including a corporation) to conduct the affairs of an enterprise through a "pattern of racketeering activity" under certain circumstances. 18 U.S.C. § 1962(c). A pattern of racketeering activity, in turn, is established where the defendant commits "at least two acts of racketeering activity." 18 U.S.C. § 1961(5). These acts include, among other things, "any act which is indictable" as one of dozens of federal crimes, including mail fraud. 18 U.S.C. § 1961(1)(B).

RICO contains multiple enforcement provisions to punish violators. In addition to providing for criminal penalties, 18 U.S.C. § 1963, and civil enforcement by the Attorney General, 18 U.S.C. § 1964(b), RICO contains an express private right of action for persons injured "by reason of" a RICO violation. 18 U.S.C. § 1964(c). Thus, although a violation of RICO can be redressed in a civil action,

what is redressed is not a violation of a civil law, but a violation of RICO — a criminal statute that prohibits the commission of a pattern of acts indictable as specified state or federal crimes. As discussed in more detail below, petitioners misunderstand this when they argue that RICO requires a plaintiff to show a violation of common law civil fraud to prevail on a RICO claim based on predicate acts indictable as mail fraud.

B. Neither The Mail Fraud Statute Nor RICO Contains A Reliance Element.

As petitioners concede, neither the mail fraud statute nor RICO contains an express reliance requirement. By its terms, the mail fraud statute contains no reliance requirement and, in *Neder v. United States*, this Court affirmed that "[t]he common-law requirement[] of 'justifiable reliance' . . . plainly ha[s] no place in the federal fraud statutes." 527 U.S. 1, 24-25 (1999) (citing *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989)). *See Anza*, 547 U.S. at 476 (Thomas, J., concurring in part and dissenting in part).[4] Likewise, there is no free-

[4] Although petitioners suggest that respondents have not adequately pleaded a mail fraud violation because the false statements in question were not mailed, Petr. Br. 8, 36, or because the County rather than petitioners undertook the mailings, *id.* at 8, that is incorrect. It is settled law "that 'innocent' mailings — ones that contain no false information — may supply the mailing element [of 18 U.S.C. § 1341]." *Schmuck v. United States*, 489 U.S. 705, 715 (1989) (citing *Parr v. United States*, 363 U.S. 370 (1960)). Likewise, a defendant may commit mail fraud even where the defendant does not use the mails itself: the statute requires only that the defendant "cause[]" the mails to be used. 18 U.S.C. § 1341. And "[w]here

standing reliance requirement in RICO's text. Congress articulated the elements of a RICO violation (*e.g.*, commission of defined predicate acts, engaging in a pattern of racketeering), but reliance is not one of them. *Cf. NOW v. Scheidler*, 510 U.S. 249, 257 (1994) ("Nowhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required.").

Petitioners nevertheless contend that a reliance requirement should be read into the statute "under governing common law principles." Petr. Br. 16. Under petitioners' view, when a RICO violation is redressed through a civil action, the elements of the claim are transmuted: "pleading a violation of the criminal mail fraud statute is not sufficient to establish a predicate act." *Id.* at 17. Instead, a civil RICO plaintiff must satisfy the elements of the "common law of civil fraud" to establish a RICO violation. *Id.* at 18.

This argument is based on a confused and incorrect reading of the statute. A claim for damages under civil RICO, like any other means of enforcing RICO, requires a "violation" of RICO. 18 U.S.C.

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one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pererira v. United States*, 347 U.S. 1, 8-9 (1954). Here, petitioners prepared notices and provided them to the County so the County would mail them "in the ordinary course of business" to inform the delinquent taxpayers that petitioners had (unlawfully) acquired liens on their property. JA 19-20 (Compl. ¶¶ 40-42). That is all the mail fraud statute requires.

§ 1964(c). And Congress has provided that mail fraud, and not common law fraud, serves as a predicate act for a RICO violation. Indeed, if respondents had alleged common law fraud as a predicate act, they would not have stated a claim under RICO. *Cf. Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1422 (3d Cir. 1991) ("[RICO] equates 'racketeering activity' with the predicate offenses.") (Alito, J., concurring).

Nor is it plausible to contend that "mail fraud" takes on additional elements drawn from the common law when it serves as a predicate act in a civil RICO claim. RICO defines a predicate act as "any act *indictable* under . . . 18 U.S.C. § 1341." 18 U.S.C. § 1961(1)(B) (emphasis added). Congress' use of the word "indictable" makes plain that a predicate act exists where (and only where) the requirements for a *criminal* mail fraud prosecution are satisfied. As Justice Thomas put it, "[b]ecause an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of § 1962, without proof of reliance." *Anza*, 547 U.S. at 476 (Thomas, J., concurring in part and dissenting in part).

Part of petitioners' error stems from a mistaken reading of *Neder*. As noted above, *Neder* held that the mail fraud statute could be violated without a showing of reliance. *Neder* specifically stated that although reliance was required in civil common law fraud actions, the mail fraud statute did not incorporate this requirement. *Neder*, 527 U.S. at 22.

Petitioners extrapolate from this statement that when mail fraud is part of a civil RICO claim, civil common law elements control. Petr. Br. 17-19. But RICO does not authorize claims for common law fraud. Instead, as Chief Judge Boudin explained, "Congress structured its civil remedy to allow recovery for harm caused by defined *criminal* acts . . . and . . . the federal mail fraud statute does not require reliance." *Loiselle*, 303 F.3d at 104 (emphasis added). This Court already has decided that common law reliance is not necessary to make mail fraud indictable, and nothing in RICO authorizes a return trip to the common law to impose additional elements. Put simply, RICO takes its predicate acts as it finds them.

To be sure, a showing of reliance by someone — though not necessarily the plaintiff — will generally be necessary to show proximate cause, which is a requirement that RICO imposes in all civil damages cases, regardless of the predicate act. *See infra*. "But the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action." *Anza*, 547 U.S. at 478 (Thomas, J., concurring in part and dissenting in part). Reliance may be relevant to the proximate cause inquiry, but it is not an independent element of a RICO claim. *See Loiselle*, 303 F.3d at 104 (refusing to "import" any reliance requirement into the RICO statute, and instead finding proximate cause sufficient "to shape and delimit" liability).

Justice Thomas' opinion for the Court in *Beck v. Prupis*, 529 U.S. 494 (2000), is not to the contrary. In that case, the plaintiff alleged that the defendants had committed a conspiracy to violate RICO, and this Court was asked to determine what it meant for a civil RICO plaintiff to be injured by reason of a "conspiracy" to violate RICO. *Id.* at 500. RICO does not define the term "conspiracy," and this Court reasoned that Congress intended the phrase "injured by reason of a conspiracy" to carry its "settled" common law meaning. *Id.* While it was appropriate for the Court to look to the common law to flesh out a term — conspiracy — that RICO does not define and that had a definite meaning at common law, that approach does not aid petitioners because RICO *does* define its predicate acts: they include, as relevant here, acts "indictable" as "mail fraud." For the reasons described above, RICO's text and structure preclude reverting back to the civil common law to graft additional elements onto the mail fraud statute.

Ultimately, petitioners ask this Court not to read RICO in light of the common law, but to rewrite the statute. This Court has consistently refused to ignore RICO's text and to impose restrictions that Congress did not legislate. *E.g., Turkette*, 452 U.S. at 580 (declining to limit RICO to violations by "legitimate" enterprises because "on its face" RICO's definition of "enterprise" contained no such limitation); *Sedima*, 473 U.S. at 493-95 (holding that RICO's civil provisions were not limited to defendants who had already been criminally convicted, and that RICO plaintiffs need not allege a special "racketeering"

injury, because neither limitation was present in the text of the statute); *H.J. Inc.*, 492 U.S. at 243-44 (holding that RICO patterns were not limited to acts "characteristic of organized crime" because "such a limitation . . . finds no support in the Act's text"); *NOW*, 510 U.S. at 257 (holding that civil RICO suits were not limited to racketeering motivated by an economic purpose because "nowhere in [RICO] is there any indication that an economic motive is required"); *see also Anza*, 547 U.S. at 478 (Thomas, J. concurring in part and dissenting in part). The same result is required here: this Court should reject petitioners' invitation to hold that reliance is a free-standing element of a civil RICO claim based on mail fraud.

II. RELIANCE BY THE PLAINTIFF IS NOT NECESSARY TO ESTABLISH PROXIMATE CAUSE FOR A RICO CLAIM PREDICATED ON MAIL FRAUD.

Having failed to establish that reliance by the plaintiff is a free-standing element of RICO, petitioners shift gears and argue that first-party reliance is incorporated into the statutory scheme as an indispensable element of § 1964(c)'s requirement of proximate cause. Respondents do not deny, of course, that reliance is often relevant to the proximate cause analysis; indeed, it generally will be impossible to establish even but-for causation without reliance by someone. As Justice Thomas observed, the fact that reliance is not an element of the offense "is not to say that, in the general case, a plaintiff will not have to prove that someone relied

on the predicate act of fraud as part of his case." *Anza*, 547 U.S. at 478.

That is no help to petitioners, however, because respondents' complaint amply alleges such reliance — the County relied on petitioners' fraudulent statements. Absent petitioners' fraud, the County would have barred petitioners from the tax sales, and it certainly would not have counted petitioners separately in allocating properties among tax buyers willing to accept a 0% penalty. To prevail, therefore, petitioners must go further: not only is reliance required in every case to establish proximate cause, but that reliance must be *by the plaintiff*. Petr. Br. 28 (contending that proximate cause can be established "only where the plaintiff can demonstrate that he relied on the misrepresentation").

There is no basis for petitioners' first-party reliance requirement. Centuries of cases from the common law as well as this Court's teachings on proximate cause refute petitioners' unyielding rule. As the Seventh Circuit correctly held, a defendant's mail fraud can proximately cause injury even in the absence of reliance by the plaintiff where, as here, the plaintiff was directly and intentionally injured by the defendant's scheme, the plaintiff's damages were entirely attributable to the defendant's conduct and there are no intermediate parties with whom damages would need to be apportioned, and there is no distinctly better enforcer to bring a RICO claim to hold the defendant accountable for its fraud.

A. "Plaintiff" Reliance Is Not Required For Common Law Fraud Claims.

1. Proximate cause is "causation substantial enough and close enough to the harm to be recognized by law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). To define proximate cause in the context of RICO, this Court in *Holmes* and again in *Anza* "turned to the common-law foundations of the proximate cause requirement, and specifically the demand for some direct relation between the injury asserted and the injurious conduct alleged." *See Anza*, 547 U.S. at 547 (internal quotation marks omitted).

There is little doubt that the claims here satisfy any demand for directness in the common law. Indeed, common law fraud jurisprudence abounds with cases in which defendants were held liable for fraud to plaintiffs who did not receive or rely on the fraud or deception, but who were directly injured by it. Lack of reliance *by the plaintiff* on defendants' fraudulent statements poses no bar to relief in such cases.

In *Rice v. Manley*, 66 N.Y. 82 (1876), for example, plaintiffs had entered into an agreement with a third party vendor to purchase "a large quantity of cheese, to be delivered at a future day." *Id.* at 83. Defendant, in an effort to obtain the cheese for himself, falsely represented to the vendor that plaintiffs no longer wished to purchase the cheese, and thereby induced the vendor to sell the cheese to defendant rather than to plaintiff. *Id.* at 84. Relying

on a string of earlier cases, the New York Court of Appeals upheld a fraud verdict in favor of plaintiff:

> The mere forms adopted for the perpetration of frauds are of little importance; it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce the injury, or whether it be direct or indirect in its consequences. Schemes of fraud may be so cunningly devised as to elude the eye of justice, but they must not escape condemnation and reparation when discovered.

Id. at 87.

Rice v. Manley relied in part on the New York trial court decision in *Benton v. Pratt*, 2 Wend. 385 (N.Y. Sup. Ct. 1829). There, plaintiff, a hog farmer, brought a fraud claim against defendant, a competing hog farmer, for falsely representing to certain of plaintiff's customers that plaintiff had abandoned his intention to sell and deliver his hogs to them. Relying on this fraudulent representation, plaintiff's customers agreed to purchase defendant's hogs instead. *Id.* at 385-86. Even though the fraud was directed to a third party, the court found "an unqualified falsehood, with a fraudulent intent as to a present or existing fact, and a direct, positive and material injury resulting therefrom to the plaintiff," and held that "[t]his is sufficient to sustain the action." *Id.* at 390.

To the same effect is *Gregory v. Brooks*, 35 Conn. 437 (1868). There, the plaintiff wharf owner alleged

that defendant, in order to deprive the plaintiff of business, had fraudulently represented himself to be a superintendent of wharves and, in that capacity, had ordered the captain of a vessel unloading at plaintiff's wharf to move therefrom. The court sustained the action, emphasizing that "the cases are numerous where injuries have been holden actionable although not directly committed upon the plaintiff in the case, if they were intended to affect and did injuriously affect him in his contract or business relations." *Id.* at 446; *see also id.* at 447-48 ("[A]lthough the representations and order are alleged to have been made to the captain of the vessel as occupant of the wharf, they are not alleged to have been made with any design to injure him, or any other design than to injure the plaintiff."). The common law is rife with similar cases.[5]

Nor is the sufficiency of third-party reliance merely a relic of a bygone era. For example, in *Buxton Manufacturing Co. v. Valiant Moving & Storage, Inc.*, 239 A.D.2d 452 (N.Y. App. Div. 1997), plaintiff brought an action for fraud based on defendant's false certification to the Department of Agriculture that all subcontractors and suppliers on a project had been paid. Plaintiff, a supplier, alleged that without defendant's false certification, the government would not have paid the defendant in

[5] *See*, *e.g.*, *Yates v. Joyce*, 11 Johns. 136 (N.Y. Sup. Ct. 1814); *Adams v. Paige*, 24 Mass. 542 (1829); *Green v. Button*, 2 C. M. & R. 707, 150 Eng. Rep. 300 (Ex. 1835); *Marsh v. Billings*, 61 Mass. 322 (1851); *Snow v. Judson*, 38 Barb. 210 (N.Y. Sup. Ct. 1862); *Hughes v. McDonough*, 43 N.J.L. 459 (N.J. 1881); *Lewis v. Corbin*, 81 N.E. 248 (Mass. 1907).

full, but would have withheld an amount sufficient to pay plaintiff's outstanding claim. The court sustained the claim for fraud, explaining:

> It is generally the case that a cause of action to recover damages for fraud requires, *inter alia*, a showing that a false representation was made to the injured party, for the purpose of inducing reliance thereon, and reasonable reliance by the injured party. Fraud, however, may also exist where a false representation is made to a third party, resulting in injury to the plaintiff.

Id. at 453-54 (citations omitted); *see also*, *e.g.*, *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, Civ. A. No. 01-12257-PBS, 2007 WL 1051642, at *13 (D. Mass. Apr. 2, 2007) ("Third party reliance on fraud is also cognizable under New York law where there is a sufficient causal connection between a defendant's fraud and a plaintiff's injury."); *N.B. Garments (PVT) Ltd. v. Kids Int'l Corp.*, No. 03 CN. 8041 (HB) 2004 WL 444555, at 3 n.5 (S.D.N.Y. Mar. 10, 2004) (same).[6]

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[6] To be sure, and as discussed in *In re Pharmaceutical Industry* and *N.B. Garments*, there are decisions espousing the principle that fraud requires reliance by the plaintiff (including cases cited by petitioners and their *amici*), but those decisions overlook the longer line of cases accepting third-party reliance in cases such as the one here. The more important point, moreover, discussed *infra*, is that the common law has come to differentiate various types of fraudulent conduct, and there is no question that the common law continues to recognize claims for damages based on false statements made to third parties that directly injure the plaintiff.

2. Ignoring this abundant case law, petitioners and their *amici* turn to the Restatement to try to bolster their claim that "a civil plaintiff may recover for fraud 'if, but only if, he relies on the misrepresentation in acting or refraining from action and his reliance is justifiable.'" Petr. Br. 22 (quoting *Restatement (Second) of Torts* § 537 (1977)). But petitioners omit the critical portion of the Restatement section on which they rely. The full provision reads: "The *recipient* of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if, (a) he relies on the misrepresentation in acting or refraining from action, and (b) his reliance is justifiable." *Restatement (Second) of Torts* § 537 (1977) (emphasis added). In many — perhaps most — cases of fraud, it is the *recipient* of the misrepresentation that is harmed by its falsity, and the Restatement reasonably requires that before the *recipient* can recover for pecuniary loss, the recipient must establish that he or she justifiably relied on the misrepresentation.

But there is nothing in the Restatement that suggests that frauds can be perpetrated *only* against the recipient of a misstatement. Rather, the Restatement recognizes, consistent with the long line of cases reviewed above, that frauds can occur in many ways, some of which involve falsehoods directed at third parties. Some of these frauds, in the classification of the Restatement, have acquired specialized labels as the law of torts has developed, but they are frauds just the same. Thus, the Restatement recognizes the fraud of "injurious

falsehood," which involves the publication (in the broad sense of the word) of "a false statement harmful to the interests of another." *Restatement (Second) of Torts* § 623A (1977). The comments explain that "[t]he general principle stated in this Section is applied chiefly in cases of the disparagement of property in land, chattels or intangible things or of their quality," although the rule "is equally applicable to other publications of false statements that do harm to interests of another having pecuniary value and so result in pecuniary loss." *Id.* cmt. a. The comments provide a series of illustrations, all of which involve false statements made to a third party (including government authorities). *Id.*

Similarly, the Restatement recognizes a tort where one "intentionally and improperly interferes with another's prospective contractual relation," *Restatement (Second) of Torts* § 766B (1979), and it emphasizes that this tort can arise where the defendant "induc[es] a third person by fraudulent misrepresentation not to do business with the other," *id.* § 767, cmt. c. Indeed, the Restatement recognizes that liability exists for one who intentionally causes injury to another through any conduct that is culpable (such as "by telling a known falsehood") and not justifiable, *id.* § 870 and § 870, cmt. h, including "where a person defrauds another for the purpose of causing pecuniary harm to a third person," *Restatement (Second) of Torts* § 435A, cmt. a (1965) (citing § 870).

Accepting the principle of third-party reliance does not mean that all state law business torts suddenly become "federalized" and are somehow actionable under RICO. A party is liable under RICO only when it engages in a pattern of specified *criminal* activity, including mail fraud.[7] But where a pattern of indictable mail fraud is present, there is no justification for imposing an artificial limitation, supposedly drawn from the common law, that proximate cause may exist in fraud cases only where A lies to B, and B justifiably relies on the falsehood to its detriment. The common law long has found actionable — and to this day continues to recognize — many different kinds of frauds, including frauds that operate through third parties.

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[7] As defined by Congress, the mail fraud statute broadly prohibits "*any* scheme or artifice to defraud" that involves use of the mails. 18 U.S.C. § 1341 (emphasis added). This Court recognized long ago that the statute's reach is wide, including "everything designed to defraud by representation as to the past or present, or suggestions and promises as to the future," *Durland v. United States*, 161 U.S. 306, 313 (1896), and the Court rejected an argument that "the statute reaches only such cases as at common law would come within the definition of 'false pretenses,'" *id.* at 312. Accordingly, courts have found mail fraud in a wide range of factual settings, many of which did not involve false statements made directly to the person defrauded. *See*, *e.g.*, *Carpenter v. United States*, 484 U.S. 19 (1987) (mail fraud found where defendant fraudulently traded on his employer's confidential business information); Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 Wash. & Lee L. Rev. 83, 86-87 nn.12-20 (2002) (listing cases affirming mail fraud convictions for a wide range of schemes).

That the common law precludes the arbitrary and unyielding line that petitioners seek to draw is unsurprising. As this Court has emphasized, proximate cause took "many shapes" at common law, and it would be "virtually impossible to announce a black-letter rule" governing the proximate cause inquiry. *Holmes*, 503 U.S. at 268, 272 n.20 (quoting *Associated Gen. Contractors of Cal., Inc. v. California*, 459 U.S. 519, 536 (1983)). There is no basis in the common law for imposing a black-letter rule that proximate cause may exist in a fraud case only where the plaintiff received and personally relied on the defendant's falsehood.[8]

B. Reliance By The Plaintiff Is Not Required By The Directness Requirement Recognized In *Holmes* And *Anza*.

1. In addition to being consistent with the common law, respondents' assertion of proximate cause is consistent with this Court's more particular articulation of the directness requirement imposed by RICO.[9] In *Holmes* and in *Anza*, the Court

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[8] In an amicus brief on the merits filed by the United States in *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005) (No. 03-1559), the Solicitor General similarly argued that civil RICO cases based on mail or wire fraud do not require reliance by the plaintiff to establish the requisite causal link between the injury and the RICO violation. *See* Brief for the United States as *Amicus Curiae* at 21, *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005) (No. 03-1559), *available at* 2005 WL 2875061.

[9] Apart from the question of reliance, on which petitioners contended the Circuits were split, petitioners did not seek review of the Court of Appeals' proximate cause analysis,

explained the role of directness by emphasizing the three "underlying premises" of the directness requirement. First, an injury is more likely to be indirect "the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269; *Anza*, 547 U.S. at 458. Second, an injury is more likely to be indirect when allowing the claim "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Holmes*, 503 U.S at 269; *see also Anza*, 547 U.S. at 459-60. And third, an injury is more likely to be indirect when "directly injured victims can generally be counted on to vindicate the laws as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269-70; *see also Anza*, 547 U.S. at 460.

In this case, as the Court of Appeals found, all of the considerations underlying *Holmes* and *Anza* reinforce the directness of respondents' injury. First, respondents' damages are attributable *entirely* to the conduct of petitioners. In *Anza*, the plaintiffs' claim for damages required the Court to trace an "uncertain" path from defendants' tax evasion to its decreased prices to plaintiffs' lost sales. 547 U.S. at 460. In contrast, the facts here do not require the Court to undertake uncertain calculations about the

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including its application of the *Holmes* and *Anza* factors. That analysis is thus not part of the question presented.

mechanics of a typical competitive marketplace or the relative effects of multiple actors in a distribution chain. "Businesses [may] lose and gain customers for many reasons," *id.* at 459, but the same cannot be said of tax buyers and liens. Tax buyers such as respondents who seek to obtain liens at 0% penalty lose tax liens not because of price, quality, or service competition, but simply because of the presence of other qualified tax buyers in the County's rotational apportionment system. The measure of damages suffered by respondents is thus straightforward: it is the value of the liens that would have been assigned to respondents if the Related Entities had been excluded from the tax sales, as they would have been but for their fraud. *See* Pet. App. 3a (damages are "the value of the liens that would have gone to Phoenix Bond and BCS Services had Sabre Group and its affiliates complied with the Single, Simultaneous Bidder Rule"). Calculating the damages attributable to the petitioners' scheme for packing the tax sale thus depends on no "other, independent factors" that might make respondents' injury indirect.[10]

Second, because there is no "appreciable risk of duplicative recoveries," *Anza*, 547 U.S. at 459, the courts below will not have to adopt complicated rules

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[10] As even petitioners' *amicus* concedes, "[t]he unique bidding system allegedly employed by the Treasurer's Office means that one can accurately predict how tax liens will be allocated among bidders based on an examination of all bids, with allocation allegedly based on the number of bidders submitting identical bids rather than on any subjective evaluation of bids." Washington Legal Foundation ("WLF") Br. 14 n.4.

apportioning damages "among plaintiffs removed at different levels of injury from the violative acts." *Holmes*, 503 U.S. at 269. There is no need here to apportion damages between respondents and the County, because regardless of who purchases a tax lien the County will be paid its taxes in full and will suffer no financial loss. Pet. App. 5a. Respondents' injury is not derivative of any economic loss of the County, passed downstream to the tax buyer. Nor must damages be apportioned between respondents and property owners, because property owners have obtained the lowest penalty — 0% — that the County allows. *Id.* The only issue here is how the tax liens will be allocated among identical bidders who have offered the County and property owners everything they legally could obtain. And whether petitioners cheat that allocation process by bribing County officials, falsely swearing their independence from other bidders, or other illegal means, they are causing injury only to the other bidders who would have been awarded those properties but for petitioners' illegal conduct. As respondents have claimed damages only for losses stemming from those liens that they "would have been able to acquire" absent petitioners' scheme, JA ¶¶ 111, 115, 120, petitioners' potential liability is finite and readily determinable. Unlike in *Holmes*, 503 U.S. at 273, there is no risk that petitioners could be subjected to multiple overlapping damages awards by upstream or downstream entities, because there are no such entities here.[11]

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[11] Petitioners' *amici* place heavy reliance on decisions of this

Third, respondents are the only "immediate victims," *Anza*, 547 U.S. at 460, of petitioners' wrongful conduct, and thus if respondents cannot sue for RICO damages, then no one can. As noted, "Cook County did not lose even a penny," and "property owners are indifferent to who acquires the tax lien" because the penalty on virtually all properties is 0%. Pet. App. 5a. Thus, there are no more directly injured victims who can be "counted on to vindicate the law as private attorneys general." *Holmes*, 503 U.S. at 258; *Anza*, 547 U.S. at 460.

Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990), but those cases are readily distinguishable. The question addressed by the Court in each case was whether a downstream purchaser could sue for damages potentially caused because its supplier paid higher prices as a result of anti-competitive conduct in violation of the antitrust laws. The existence of complex problems of apportionment of damages among upstream and downstream entities was central to the Court's decision in both cases. Even in *UtiliCorp*, where the supplier/utility had a potential regulatory right to pass on to consumers its increased supply costs, this Court recognized that the utility would suffer its own damages as a result of changes in demand brought about by higher prices, and that, even as a regulated entity, it was not clear whether or when the utility would be able to pass on all of its increased supply costs. *See UtiliCorp*, 497 U.S. at 209 ("The state regulation does not simplify the problem but instead imports an additional level of complexity."). These problems of apportionment simply are not present here, and they are not inherent in fraudulent schemes that *directly* target one's competitor, as the common law long has recognized in classic cases such as *Rice v. Manley*, *Benton v. Pratt*, and the other cases cited in Part II.A, *supra*.

Thus, just as the instant case fits squarely within common law precedents, it fits squarely within this Court's application of those common law principles in *Holmes* and *Anza*.[12] *See* Pet. App. 4a-7a.

2. Permitting suit here is also consistent with Justice Breyer's concurring view of RICO's proximate cause requirements as set forth in *Anza*. Under Justice Breyer's view, RICO does not permit an end run around the antitrust laws by allowing claims of injury by one competitor "where the legitimate pro-competitive activity of another competitor immediately causes that injury." 547 U.S. at 479 (Breyer, J., concurring in part and dissenting in part). Here, the injury is caused not by a legitimate competitive activity such as lowering prices or producing a better product or service, but by the

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[12] This Court's recent decision in *Stoneridge Investment. Partners, LLC, v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008), interpreting the private right of action implied in § 10(b) of the Securities Exchange Act of 1934, fits squarely within the proximate cause framework recognized in *Holmes* and *Anza*. *Cf.* Petr. Br. 34. In *Stoneridge*, plaintiffs sought to impose § 10(b) liability on respondents, who were business partners of Charter Communications, a company that had issued misleading financial statements. In rejecting liability, the Court noted that "[i]t was Charter, not respondents, that misled its auditor and filed financial statements," and "nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did." 128 S. Ct. at 770. The claims at issue in *Stoneridge*, therefore, raised the precise concern this Court identified in *Holmes* and *Anza* about the difficulty in determining whether plaintiffs' damages were attributable to the defendants' conduct or, instead, to "other, independent factors." *Holmes*, 503 U.S. at 269. As noted, that concern is entirely absent here.

illegitimate activity of packing the tax sale with entities that claim to be independent but are in fact part of a coordinated scheme — an activity that hinders rather than advances competition.

Moreover, as Chief Judge Easterbrook recognized, the actions taken by petitioners did not make the lien apportionment process any more competitive or have any salutary effect on the price of liens. Virtually all liens were already being sold at the lowest possible price (*i.e.*, a 0% penalty). That is hardly surprising, because the County prohibits the sale of any lien for which there are multiple offers *above* a 0% penalty, and the County does not allow offers below 0%. More to the point, even if 0% were not otherwise the norm, the presence of a group of related tax buyers participating in a coordinated scheme is unlikely to drive down the penalty, since the entire point of the scheme is for those buyers to act in concert. The presence of the Related Entities thus has no positive effect on competition.

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In sum, there is no basis in the common law or in *Holmes* or *Anza* to justify the bright-line requirement of first-party reliance that petitioners would impose on the RICO proximate cause analysis. The intended consequence of petitioners' fraudulent scheme was to secure profits by depriving respondents and other good-faith tax buyers of their fair share of liens. "The harm to [respondents] was [thus] clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral

an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) (internal quotation marks omitted). Having purposely executed a successful scheme to obtain liens and the related profits at respondents' expense through fraud, petitioners should not be heard to complain that their conduct did not proximately cause respondent's injury.[13]

The Court of Appeals thus correctly applied *Holmes* and *Anza* when it concluded that respondents' claim of injury was sufficiently direct, discrete, and traceable to the petitioners' fraudulent conduct to satisfy proximate cause.[14]

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[13] *Amicus* Washington Legal Foundation concedes this point when it submits that victims of mail fraud who are "directly targeted" by defendants have demonstrated the existence of proximate cause. WLF Br. at 13 n.3.

[14] Although beyond the scope of the question presented, there is no basis here for concluding that respondents fall outside the zone of interests alluded to by Justice Scalia in *Holmes*. *Holmes*, 503 U.S. at 287 (Scalia, J., concurring). As Chief Judge Easterbrook recognized, Pet. App. 8a, the mail fraud statute was designed to protect those deprived of money or property as the direct victims of a scheme to defraud, and RICO was intended to provide a remedy for businesses that were the direct victims of such mail fraud schemes. Respondents' allegations place them squarely within the "class of persons" that Congress was trying to protect. *Holmes*, 503 U.S. at 287 (Scalia, J., concurring). Nor is there any serious contention that the type of injury suffered by respondents lies outside the relevant zone of interests. *Cf. id.* (discussing heart attack caused by one learning of fraud).

III. POLICY CONCERNS CANNOT JUSTIFY IMPOSING A FIRST-PARTY RELIANCE RESTRICTION HERE.

Unable to locate a first-party reliance restriction in the common law or in this Court's RICO decisions, petitioners and their *amici* raise a series of policy and practical concerns about the scope of RICO and the purported "over-federalization" of state law that they say support restricting RICO claims. But even if this Court rather than Congress were the right body to impose restrictions that have no basis in the language of the statute — and it is not — petitioners' practical concerns are overstated and their solutions are at odds with the congressional policies reflected in RICO. Indeed, petitioners' quarrel is at bottom with Congress' decision to include mail fraud and wire fraud as predicate acts, a policy judgment that was, and is, Congress's to make.

At the outset, the purported concern of petitioners and their *amici* about a flood of RICO claims is not credible. Despite their invocation of the "ever-increasing number of civil RICO suits filed each year," WLF Br. at 18, RICO claims have not increased in recent years, and they remain a tiny percentage of the federal civil docket.[15] Nor will affirmance here change that. It is already the law in

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[15] In 2001, there were 791 private civil RICO cases filed, and in 2007 there were 703 cases filed. In 2001, RICO cases accounted for 0.31% of the federal civil docket, while in 2007 RICO cases had *declined* to approximately 0.25% of the federal civil docket. *See* Federal Judicial Caseload Statistics 2001-2007, Table C-2, *available at* http://www.uscourts.gov/caseloadstatistics.html.

most Circuits that the direct victim of a mail fraud scheme may pursue relief even if the scheme directs the fraudulent statements to a third party.[16] And

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[16] The Circuit cases cited by petitioners, *see* Petr. Br. 29-34, involve frauds perpetrated on the *recipients* of the false statements at issue. More significant, virtually every Circuit to consider the issue has recognized that, in a case where the plaintiff is the "target" or "direct victim" of a fraud involving false statements to third parties, the plaintiff may state a claim for fraud-based civil RICO. *See*, *e.g.*, *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 564-65 (5th Cir. 2001) ("a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present"); *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004) (RICO claim may be stated "even where the scheme depended on fraudulent communications directed to and relied on by a third party"), *rev'd on other grounds*, 547 U.S. 451 (2006); *Mid Atlantic Telecom, Inc. v. Long Distance Srvcs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994) (RICO claim could be stated if plaintiff showed it was a "direct target" of the fraud and defendant sought "to obtain an unfair competitive advantage in recruiting [plaintiff's] customers"); *cf. Brown v. Cassens Transp. Co.*, 492 F.3d 640, 644-46 (6th Cir. 2007). Other Circuits have adopted a broad view of reliance based on plaintiff's "reliance" on the "integrity" of official proceedings. *See Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 339 (4th Cir. 1996) (remanding to allow RICO claim to proceed if plaintiffs pleaded they had acted in "reliance on the apparent legitimacy and legality of the operation"); *Living Designs, Inc. v. E.I. DuPont de Nemours and Co.*, 431 F.3d 353, 363 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2861 (2006) (finding it sufficient that plaintiff had relied on defendant to "obey statutes, court orders, court rules … and representations made under oath to the court by [defendant]") (quoting complaint) (internal quotation marks omitted). Petitioners are thus wrong to suggest that courts have upheld RICO actions based on fraud only when the plaintiffs were injured by false statements made directly to them.

there is no evidence that RICO claims are more abundant in the Circuits that have rejected petitioners' argument than in Circuits that have yet to do so, or that RICO claims based on mail fraud have become more prevalent.

That is not surprising. The scope of claims implicated by the rule the Seventh Circuit applied is narrow and of strong pedigree. Petitioners targeted their direct competitors for the liens by making false statements to the County, which itself suffered no financial injury, depriving respondents of liens that they otherwise would have received. This fact pattern — unlike those of *Holmes* and *Anza* — fits comfortably within a common law framework that courts have applied for hundreds of years.

Moreover, Congress and this Court have *already* ensured that truly indirect frauds are eliminated by the application of the rigorous proximate cause analysis set forth in *Holmes* and *Anza*. *See Brown v. Gardner*, 513 U.S. 115, 119 (1994) (observing that (proximate cause "narrow[s] the class of compensable cases" by "eliminating remote consequences"); *Holmes*, 503 U.S. at 268 (same). By focusing on the availability of other victims more directly affected by a particular fraud and by limiting recovery when there are upstream victims who have been damaged by the fraud, the *Holmes* and *Anza* factors help to identify the most appropriate plaintiff to hold defendants accountable for their fraud. In the usual case, as *Holmes* and *Anza* make clear, that plaintiff will be the party who relies directly on the fraud. Accordingly, the class of cases affected by affirming

Chief Judge Easterbrook's decision will be relatively modest.[17]

Nor is there any basis to petitioners' claim that affirmance here would, for example, transform every products liability case into a RICO case. Petr. Br. 14. At the outset, most products liability cases involve injuries to *persons* rather than injuries to "business or property" and thus are outside the scope of RICO in any event. Moreover, the directness requirement recognized in *Holmes* and *Anza* will generally limit the availability of RICO in such cases, as even the cases cited by petitioners confirm.[18] Nor would

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[17] Although the number of third-party reliance cases that will satisfy the *Holmes* and *Anza* factors may prove to be few, the instant case is by no means a "perfect storm" exception of unique, incomparable facts. In addition to fact patterns similar to that at issue here, it is not hard to imagine that a mob-controlled enterprise could send forged documents and fabricated witness statements through the mails to third parties to directly harm a competing business, causing injury of the precise kind Congress sought to address through RICO. If the other elements of RICO are present, the proper inquiry in such cases should be proximate cause and the directness requirement set forth in *Holmes* and *Anza*, not whether plaintiff could satisfy an arbitrary requirement of "first-party" reliance.

[18] For example, in *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000) — a case repeatedly cited by petitioners and their *amici*, *e.g.*, Petr. Br. 14, 18, 29, 39 — plaintiffs who owned buildings that contained defendants' plumbing products alleged that defendants had made fraudulent statements to contractors and others to encourage usage of the products. Judge Higginbotham's unanimous opinion for the court applied *Holmes* and rejected plaintiffs' RICO claim, concluding that the alleged injury was indirect because of the presence of upstream contractors better situated

affirming the Seventh Circuit give a class of such product liability plaintiffs any greater leverage, *cf.* McKesson Corp. ("McKesson") Br. 29-33, since each plaintiff would still have to demonstrate proximate causation.[19]

There is similarly no force to the argument that a first-party reliance requirement is appropriate where the third party who relies on the fraud is a government entity, which could in theory protect its own interests by prosecution or otherwise. At common law, the presence of the government as the third party mechanism for a defendant's fraud was no bar to recovery. *See*, *e.g.*, *Restatement (Second) of Torts* § 623A, cmt. a (1977); *Buxton Manufacturing*, 239 A.D.2d at 453-54 (misrepresentations to U.S. Department of Agriculture); *cf. Suffolk County v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990) (holding that plaintiff could in theory state

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to bring claims. *Id.* at 560 ("any fraud during the sale of those products proximately injured only those initial purchasers who relied on the alleged misrepresentations"). The court made clear, however, that it was *not* applying any inflexible rule of first-party reliance, observing that, in addition to those who relied on the fraud, appropriate potential plaintiffs might include those who had "been the target of the fraud," as well as "defendants' competitors" seeking to "recover for injuries to competitive position." *Id.* at 561. Cases like *Summit* thus confirm respondents' position that the proximate cause analysis recognized in *Holmes* and *Anza*, and not some inflexible rule of first-party reliance, charts the proper course.

[19] Equally flawed is petitioners' argument that affirmance will permit a civil RICO claim every time a business competitor lies to the government. Indeed, *Anza* itself, which rejected such a claim, makes that clear.

a claim based on misrepresentations to the state Public Services Commission, although concluding that plaintiffs had failed to show the Commission actually relied on the misrepresentations) (cited with approval by this Court in *Holmes*, 503 U.S. at 272 n.19).

Petitioners' invocation of the potential for government enforcement is, moreover, especially misplaced here. The County suffered no financial injury and thus has little incentive to pursue potential wrongdoing. *See* Pet. App. 6a. Municipal governments have limited budgets, with myriad priorities competing for scarce resources. There is thus no justification for crafting special proximate cause restrictions on RICO's express private right of action simply because a government entity may prosecute or penalize wrongdoers.

Limiting recovery when the government has enforcement authority is also at odds with Congress' inclusion of a private right of action for RICO claims predicated on mail fraud. As Chief Judge Easterbrook noted, "if a government's ability to penalize fraud knocked out private litigation, then § 1964 would no longer apply when the predicate act is fraud, for governments always have some ability to detect and penalize fraud." Pet. App. 6a-7a. And it would be particularly unwarranted to rely on government prosecution in the context of RICO given Congress's conclusion that RICO was necessary to combat entities that were "subvert[ing] and corrupt[ing] our democratic processes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84

Stat. 922-23 (Statement of Findings and Purposes). RICO's private right of action was intended to "enhance the effectiveness of [RICO's] prohibitions," *Sedima*, 473 U.S. at 487-88, and given that respondents are the sole parties injured by petitioners' actions, their suit is an entirely appropriate use of the right of action.

Similarly at odds with RICO is petitioners' effort to limit the claims on the ground that petitioners and respondents are business competitors. Petr. Br. 38; WLF Br. 15-16. The harm that businesses suffered at the hands of their competitors' illegal actions was at the heart of Congress's concerns. *See*, *e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (finding that organized crime's "illegal use of force, fraud and corruption . . . weaken[s] the stability of the Nation's economic system, and harm[s] . . . competing organizations" (Statement of Findings and Purposes). And as this Court has previously observed, Congress evinced concern for the competitive harm caused by even "legitimate" businesses engaged in unlawful activity because "[l]egitimate businesses 'enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.'" *H.J., Inc.*, 492 U.S. at 249 (quoting *Sedima*, 473 U.S. at 499). The very fact that Congress drafted RICO to provide recovery for "injury to *business* or property" indicates that the claim of injury alleged here is within RICO's intended ambit.[20]

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[20] McKesson alternatively urges the Court to adopt what McKesson calls the "immediate victim" approach rather than

In any event, all of petitioners' arguments for drawing arbitrary and unyielding lines to limit RICO claims proceed from an improper premise: that Congress's express enactments may be contravened for the sake of policy considerations. The best indication of the "appropriate scope" of RICO is the statute's text and structure, which plainly do not incorporate a reliance element for civil RICO actions. What petitioners and *amici* style as the "over-federalization" of RICO claims amounts to a raw petition to this Court to trump Congress's chosen policies with their own.

This Court has repeatedly heard and rejected similar policy pleas. *See supra* 23-24 (collecting cases); *see also H.J. Inc.*, 492 U.S. at 249 ("[R]ewriting [RICO] is a job for Congress, if it is so inclined, and not for this Court."); *Schreiber Distrib. Co. v. Serv-well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) ("[W]e are required to follow where the words of [RICO] lead.") (Kennedy, J., concurring). As Chief Justice Rehnquist put it, "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *NOW*, 510 U.S. at 262 (refusing to read an "economic motive" requirement into RICO) (quoting *Sedima*, 473 U.S. at 499).[21]

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the "principal losers" approach. McKesson Br. 34-35. As McKesson's brief makes clear, respondents would prevail under McKesson's alternative approach.

[21] Petitioners and *amici* repeatedly cite a 1989 lecture given by Chief Justice Rehnquist in which he questioned Congress's

Indeed, the force of the argument that Congress rather than the Court should set policy here is at its zenith because Congress has not hesitated to amend RICO when it believed that policy concerns so demanded. Thus, for example, in response to concerns raised by securities defendants regarding the scope of RICO in cases of securities fraud, Congress in 1995 removed securities fraud from the purview of RICO's private right of action altogether. *See* 18 U.S.C. § 1964(c) (providing that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962"). More broadly, Congress has not hesitated over the years to alter RICO's predicate acts when it concluded that policy considerations required. *See generally Anza*, 547 U.S. at 472-74 (Thomas, J., concurring in part and dissenting in part) (noting legislative proposals and amendments to RICO).

In sum, there is little doubt that the various rules advanced by petitioners and their *amici* would limit to some degree the number of RICO cases that could be brought with mail fraud or wire fraud as predicate acts. But a mere reduction in the number of RICO cases, untied to text, common law, or this Court's precedent, has little to recommend it. If anyone is to decide that victims are bringing too many RICO

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wisdom in drafting RICO so broadly. *E.g.* Petr. Br. 37, 38. None of them, however, cites Chief Justice Rehnquist's subsequent opinion for the Court in *NOW*, quoted above, in which he held that Congress's decision to draft a broad statute must be respected.

cases based on mail fraud and wire fraud, it is Congress, not this Court, that must do so. And that is particularly so when, as here, the arbitrary restriction that petitioners request will result in the elimination of claims that were at the core of cases that motivated Congress to act in the first place — cases of honest businessmen directly harmed in their business by competitors who violate the law.

CONCLUSION

The decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

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March 12, 2008